**Wells Fargo Armored Services Corp. *and* United Armed Guards of America *and* Louis E. Monczka.** Cases 34–CA–7059, 34–CA–7085, 34–CA–7116, 34–CA–7121, 34–CA–7166, and 34–RC–1347

November 29, 1996

## DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 29, 1996, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. We agree with the judge's conclusion that the Respondent did not unlawfully discharge Charging Party Louis Monczka. In doing so, however, we do not agree with the judge's findings, in the final paragraph of section IV,B of his decision, that there was no union animus displayed by the Respondent against Monczka, and that the sole union activity on Monczka's part in support of the General Counsel's case was that Monczka was elected union steward the day before his discharge.

During the May 23, 1995[3] 1-day strike in the Armored unit,[4] which occurred 2 days before ATM unit employee Monczka's discharge, the Respondent unlawfully threatened to discharge all ATM employees who were still out in support of the Armored unit strike. Monczka was the only ATM unit employee to remain out on strike following the threat. Thus, contrary to the judge's finding, the Respondent did display animus against Monczka because of his union activity. Nevertheless, we agree with the judge, for the reasons he fully sets forth in section IV,B of his decision, that the Respondent has established that it would have discharged Monczka even in the absence of his union activity, because of his ongoing failure to provide the Respondent with requested information about his previous periods of employment. Accordingly, we affirm the judge's recommended dismissal of the allegation that Monczka was unlawfully discharged.

We also affirm the judge's recommended overruling of the objection to the election in the ATM unit. The objection was based on Monczka's discharge and is the only objection pending.[5] Consequently, we shall issue a Certification of Results of Election, which, as the judge noted, precludes a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[6] Therefore, we find it unnecessary to pass on any of the judge's discussion about a *Gissel* bargaining order in section IV,D of his decision, which the judge included in the event the Board disagreed with his recommendation that the objection to the election be overruled.

2. We also agree with the judge, for the reasons he fully sets forth in section IV,C of his decision, that the Respondent unlawfully refused to provide the Union with some of the financial information it requested during negotiations for an initial collective-bargaining agreement covering the Armored unit, and that it also unlawfully refused to provide the Union with all but one part of the requested information at or near the Respondent's facility at either Bloomfield, Connecticut, or Lyndhurst, New Jersey. We further find, however, contrary to the judge, that the Respondent unlawfully failed and refused to provide the Union with requested financial information for 1993. The Union requested the 1993 financial information in question as well as the 1994 financial information that the Respondent unlawfully failed and refused to provide at either its Bloomfield or Lyndhurst facility. The Union expressly informed the Respondent that it needed the 1993 financial information because:

> One year's [i.e., here, 1994's] worth of financial performance cannot reveal the true picture of branch economics. There must be a comparator period. It is necessary to assess whether there are particular areas responsible for the increase in expenditures or decrease in revenues.

We find that the Union has articulated a reasonable basis for seeking the requested 1993 financial informa-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and we find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are between August 1, 1994, and July 31, 1995, unless stated otherwise.

[4] The Union had been certified to represent the Armored unit on August 31. During the time of the events in question here, it was also seeking to represent the employees in the ATM unit. Toward that end, the Union filed a representation petition on May 25, and an election was conducted on July 12. The tally was 2 votes for and 13 votes against the Union.

[5] The objection is referred to in the second paragraph of the judge's decision, as well as in the final sentence of sec. IV,B and again in the first paragraph of sec. IV,D.

[6] See *White Plains Lincoln Mercury*, 288 NLRB 1133, 1137 (1988).

tion together with the related 1994 financial information. Indeed, the branch profit-and-loss statement that the Respondent furnished the Union revealed operating losses from 1993, and the judge himself recognized that that information was included "for comparison sake to establish the extent of the 1994 losses." Similarly, the Union needed the comparative 1993 information to assess the 1994 financial data that the judge found was unlawfully withheld. Accordingly, we find that the Respondent violated Section 8(a)(5) by failing to provide the Union with the requested 1993 financial information, and we shall order that the Respondent provide it to the Union.[7]

3. As stated above, we affirm the judge's finding, for the reasons he fully sets forth, that the Respondent also unlawfully refused to provide the requested information to the Union at the Respondent's Bloomfield or Lyndhurst facility, as the Union requested, rather than at or near the Respondent's Atlanta corporate headquarters, as the Respondent insisted. The General Counsel has, however, excepted to the judge's failure to grant the General Counsel's requested additional remedy of extending the Union's certification year in the Armored unit, to remedy the bargaining delay caused by the Respondent's unlawful refusal to provide the Union with requested information during negotiations for an initial collective-bargaining agreement in the Armored unit. We find merit in this exception.

Although the Union was certified in the Armored unit on August 31, the parties did not hold their first negotiating session for an initial collective-bargaining agreement until February 9.[8] Additional sessions were held on February 10, March 8, April 18 and 19, and July 20. The Union requested the information in question on April 21. Although the Respondent agreed on May 3 to make much of the requested information available, it nevertheless unlawfully refused to provide some other requested information, and it thereafter unlawfully refused to provide almost any of the requested information at the Respondent's facility at either Bloomfield or Lyndhurst.

Similar refusals to furnish information have been deemed sufficient to warrant an extension of the certification year.[9] In assessing the appropriate remedy in such circumstances, it is necessary to take into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a collective-bargaining agreement "without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them."[10] Various factors are considered in making such an evaluation, including the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations.[11]

We find that the Respondent's ongoing unlawful refusal since May 1995 to provide the requested information at its facility in either Bloomfield or Lyndhurst delayed and inhibited negotiations during this part of the certification year, by effectively precluding the Union from meaningfully bargaining, particularly over wages, a crucial aspect of the initial contract. Thus, although the parties met with some degree of regularity and relative frequency during February through mid-April 1995, they met only once more (and then not until July) after the Respondent's unlawful refusal in May to provide the requested information to the Union at either the Bloomfield or Lyndhurst facility. There is no showing that the Union itself acted unreasonably under the circumstances or in any way contributed to the delay in negotiations caused by the Respondent's refusal to provide the requested information to the Union at either Bloomfield or Lyndhurst. Under all of the circumstances, we find that a 6-month extension of the certification year is appropriate, starting with the date on which the Respondent provides the Union with the requested information.[12]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Wells Fargo Armored Services Corporation, Bloomfield, Connecticut, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening its employees with discharge if they continue to honor a picket line.

(b) Refusing to bargain collectively with the United Armed Guards of America as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth below by unilaterally transferring bargaining unit work previously performed by bargaining unit employees at its Bloomfield facility to

[7] See *Facet Enterprises v. NLRB*, 907 F.2d 963 (10th Cir. 1990), enfg. in relevant part 290 NLRB 152 (1988); *Stanley-Artex Windows v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968), enfg. 166 NLRB 984 (1967), cert. denied 395 U.S. 946 (1969). See also *United Stockyards*, 293 NLRB 1 (1989), enfd. per curiam 901 F.2d 669 (8th Cir. 1990).

[8] The record does not show the reason for this delay in the start of negotiations.

[9] *D. J. Electrical Contracting*, 303 NLRB 820, 820 fn. 2 (1991); *Tubari, Ltd.*, 299 NLRB 1223, 1233–1234 (1990); *Winges Co.*, 263 NLRB 152, 154–157 (1982).

[10] *Tubari, Ltd.*, supra, 299 NLRB at 1233, citing *Colfor, Inc.*, 282 NLRB 1173 (1987), enfd. 838 F.2d 164 (6th Cir. 1988).

[11] Id.

[12] See cases cited in fn. 9, supra. See generally *Colfor, Inc.*, supra (extensions need not be the product of a simple arithmetic calculation).

nonunit employees or by assigning nonunit employees to perform such work. The unit is:

> All full-time and regular part-time messenger guards, driver guards, guards and vault custodians who perform guard duties as defined by Section 9(b)(3) of the National Labor Relations Act, employed by the Employer at its Bloomfield, Connecticut facility, but excluding all other employees, all office clerical employees, sales personnel, mechanics, and all professional employees and supervisors as defined in the Act.

(c) Refusing to bargain collectively with the Union by unilaterally reassigning bargaining unit employees to a different job classification and by unilaterally changing their wage rates.

(d) Refusing to bargain collectively with the Union by refusing to provide it with financial, wage, and personnel information relevant to the Union's role as collective-bargaining representative of the unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all employees for any loss they may have suffered as a result of the Respondent's unilateral reduction in wages, with backpay and interest as prescribed, respectively, in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Rescind the transfer of bargaining unit work previously performed by bargaining unit employees at its Bloomfield facility to nonunit employees and the assignment of nonunit employees to perform such work, and, on request, bargain with the Union about these matters.

(c) Rescind the reassignment of bargaining unit employees to a different job classification and the changing of their wage rates, and, on request, bargain with the Union about these matters.

(d) Provide the Union with the information requested in its April 21, 1995 letter, with the exception of item 3 if no such reports exist, and provide the Union with this information in Lyndhurst, New Jersey, or Bloomfield, Connecticut.

(e) Upon compliance with paragraph 2(d) above, on request, and for 6 months thereafter as if the initial certification year had not expired, resume bargaining collectively in good faith with the Union concerning wages, hours, and terms and conditions of employment.

(f) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Bloomfield, Connecticut facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

## CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Armed Guards of America in Case 34–RC–1347, and that it is not the exclusive representative of the bargaining unit employees in that case.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge if they continue to honor a picket line.

WE WILL NOT refuse to bargain collectively with the United Armed Guards of America as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth below by unilaterally transferring bargaining unit work previously performed by bargaining unit employees at our Bloomfield facil-

ity to nonunit employees or by assigning nonunit employees to perform such work. The unit is:

> All full-time and regular part-time messenger guards, driver guards, guards and vault custodians who perform guard duties as defined by Section 9(b)(3) of the National Labor Relations Act, employed by us at our Bloomfield, Connecticut facility, but excluding all other employees, all office clerical employees, sales personnel, mechanics, and all professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally reassigning bargaining unit employees to a different job classification and by unilaterally changing their wage rates.

WE WILL NOT refuse to bargain collectively with the Union by refusing to provide it with financial, wage, and personnel information relevant to the Union's role as collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all employees for any loss they may have suffered as a result of our unilateral reduction in wages, with interest.

WE WILL rescind the transfer of bargaining unit work previously performed by bargaining unit employees at our Bloomfield facility to nonunit employees and the assignment of nonunit employees to perform such work, and, on request, WE WILL bargain with the Union about these matters.

WE WILL rescind the reassignment of bargaining unit employees to a different job classification and the changing of their wage rates, and, on request, WE WILL bargain with the Union about these matters.

WE WILL provide the Union with the information requested in its April 21, 1995 letter, with the exception of item three if no such reports exist, and WE WILL provide the Union with this information in Lyndhurst, New Jersey, or Bloomfield, Connecticut.

WE WILL, on providing the Union with the above information, and on request and for 6 months thereafter as if the initial certification year had not expired, resume bargaining collectively in good faith with the Union concerning wages, hours, and terms and conditions of employment.

WELLS FARGO ARMORED SERVICES CORP.

*Darryl Hale, Esq.*, for the General Counsel.
*David M. Vaughan, Esq. (Elarbee, Thompson & Trapnell)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 11 and 13, 1995,[1] and February 8, 1996, in Hartford, Connecticut. The consolidated complaint here, which issued on October 11, was based on unfair labor practice charges and amended charges filed by United Armed Guards of America (the Union) on May 11 and 25, June 16 and 22, and July 27 and 28, and by Louis E. Monczka, an individual, on May 26. The complaint alleges that Wells Fargo Armored Services Corp. (Respondent), by Dominick Riley, its area manager, threatened its ATM employees with discharge if they continued to honor the Union's picket line at it offices in Bloomfield, Connecticut (the facility), in violation of Section 8(a)(1) of the Act, and terminated its employee Monczka and reduced the hours of its employee Ralph Mariani because of their union or other concerted activities, in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleges that since about February, Respondent has assigned armored unit work to its ATM employees and that since about June, has reclassified certain employees in the armored unit and changed their hourly wage rates from $8.75 to $8, both without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent about these changes in violation of Section 8(a)(1) and (5) of the Act. The complaint further alleges that by letter dated April 21, the Union requested certain information from Respondent and the Respondent failed and refused to supply this information to the Union even though it was necessary for, and relevant to, the Union as the exclusive representative of Respondent's armored unit employees, also in violation of Section 8(a)(1) and (5) of the Act. Finally, it is alleged that this conduct is so serious that it warrants a bargaining order for Respondent's ATM unit.

At an election conducted on July 12 in the ATM unit, 2 votes were cast for the Union and 13 votes were cast against the Union, which filed timely objections to the conduct of the election. By a Report on Objections, which issued on November 13, the Regional Director found that the discharge of Monczka raised substantial and material issues of fact that would best be resolved consolidated with the unfair labor practice hearing and, on the same day, issued an order further consolidating cases consolidating this issue with the unfair labor practice issues described above.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1995.

## II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. BACKGROUND

Respondent is located in Bloomfield, Connecticut, where it employs armored guard, ATM employees, and vault employees. The armored guard employees are either driver guards or messenger guards (the armored unit). The driver stays in the front of the armored vehicle at all times to be sure that the vehicle is secure, while the messenger guard remains in the back of the vehicle with the money, checks, coins, and other items referred to in the trade as the liability. At each stop, the messenger guard brings the liability to the customer's building (or takes the liability from the building if it is a pickup) has the customer sign the required forms, and returns to the truck with the liability, if any. The ATM employees, who usually work alone, balance and replenish the ATM machines on their route and retrieve the deposits that are placed in them. They are referred to here as the ATM unit. Monczka testified that, while employed as an ATM technician by Respondent, he carried about $700,000 in cash and replenished about 12 machines daily.

A Board election was conducted among Respondent's armored guard unit on August 18, 1994. As found by Administrative Law Judge Nations in a decision he issued on July 28 involving the Respondent, and affirmed by the Board at 319 NLRB 466 (1995), the Respondent did not conduct a campaign in opposition to the Union's organizing drive and there were no meetings held with employees, no letters to employees, and no notices posted encouraging the employees to vote against the Union. The Union won the election by a vote of 27 to 0, with 2 challenged ballots, and the Union was certified as the bargaining representative of Respondent's armored unit employees employed at the facility. Negotiations between the Union and Respondent for this unit began on February 9; the principal 8(a)(5) allegation here involves an alleged failure to provide the Union with financial and other information to substantiate Respondent's economic defense. In addition, it is alleged that Respondent assigned armored unit work to its ATM employees and reclassified certain of its armored unit employees (from messenger guards to drivers) and changed their hourly rate from $8.75 to $8 an hour, all without prior notice to, or bargaining with, the Union. The 8(a)(1) and (3) allegations referred to above will be discussed first.

## IV. THE FACTS AND ANALYSIS

### A. *The Alleged Threat*

It is initially alleged that on May 23, Dominick Daniel Riley, the area manager at the facility and, admittedly, then a supervisor and agent of Respondent, threatened its ATM employees with discharge if they continued to honor the Union's picket line at the facility. Early that morning, the Union commenced a strike and picketing at the facility to protest what it considered was the lack of progress at the negotiations for the armored unit employees. Shawn Lopez, who is no longer employed by Respondent, began working at the facility in March as an ATM technician and signed a card for the Union on April 24. He testified that on May 23 he and another ATM technician, Todd Tofil, arrived together at the facility at about 7 a.m. He observed that the armored unit employees were picketing the facility; he and Tofil refused to cross the picket line to go to work. He and Tofil were called into the building and Sal Urso, the senior vault custodian and an admitted supervisor of Respondent since May 1, asked he and Tofil what they were doing and Lopez said that they were participating in the strike. Urso told them that they had to return to work or they would be terminated. As he and Tofil were discussing this matter, other ATM employees came in and Urso asked Riley to come out. Riley asked them what they were doing, and they told him that they had signed union cards and planned to support the Union. Riley told them that they could not do that because they were not part of the Union and he showed them an armored unit seniority list to prove it. He said that either they go back to work or they could go home because they would be terminated. The ATM technicians spoke amongst themselves and decided to return to work.

Tofil testified in a similar manner. He testified that he and Lopez arrived at the facility at about 7 a.m. and observed that the armored unit employees were picketing. Someone asked Lopez and Tofil if they would picket with them, and they did so. About 15 minutes later, Rich O'Donnell, alleged to be an ATM supervisor (Tofil testified that, as far as he knows, O'Donnell is an hourly paid ATM technician), came out of the building and told them that they "weren't under the agreement" and could be fired if they remained on the picket line. Shortly thereafter, while they remained on the picket line, O'Donnell told them that Riley wanted to speak to them. They went inside, and Riley showed them some list and told them that they were not in the armored unit and if they stayed on the picket line they could be fired. He and Lopez went outside and told the pickets that they would continue to picket with them if they could show them something to establish that they were under the Union. When they could not do so, he and Lopez went to work. Mariani testified that while they were picketing that morning with Lopez and Tofil, O'Donnell, who Mariani first testified was an ATM supervisor, and then testified was an ATM technician, came out to the picket line and told Lopez and Tofil that if they did not come to work they would be terminated. Lopez and Tofil went into the building and when they came out, they asked for some proof that they were in the armored unit. When they could not get that assurance, they went to work.

Urso testified that he never told any of the employees who were picketing that day that they would be fired if they did not report for work. Riley testified that his meeting with Lopez and Tofil that day lasted about 5 minutes. They kept asking him if they were going to be fired, and did they have to stay on the picket line: "I told them that they could come to work if they wanted to. They can honor the strike if they'd like to. It was their choice. They were not going to be fired by me because they stayed outside." He did not show them any union list. Brian Peterson, an ATM supervisor for Respondent, testified that he was present for the discussion between Riley, Lopez, and Tofil. Riley told them that the striking employees were represented by the Union and that the Union did not represent them because they were not in the armored branch and it would be in their best interest to return to work. Riley never told them that they would

be fired if they did not return to work, nor did he show them any employee list. He also testified that, during this period, O'Donnell was an hourly paid employee earning the same wage rate and performing the same work as the other ATM technicians.

This is a straight credibility issue, but a difficult one. Lopez and Tofil testified in a direct and credible manner that Riley told them that they would be terminated if they did not return to work on May 23. Although Tofil is still employed by Respondent, Lopez is not and, obviously, has nothing to gain from this proceeding. I also found Peterson and Urso to be credible and believable witnesses whose testimony I would normally credit. Riley, while amiable, was less credible. Overall I would credit the testimony of Lopez and Tofil, not only as credible, but reasonable considering the circumstances, and therefor find that Respondent, by Riley, on May 23, violated Section 8(a)(1) of the Act by threatening its employees with discharge if they continued to honor the Union's picket line. *Sunnyside Home Care Project*, 308 NLRB 346 (1992).

### B. *The 8(a)(3) Allegations*

It is alleged that since about May 23, Respondent reduced the hours of its armored unit employee, Ralph Mariani. Mariani has been employed by Respondent since May 1994 and has been the union secretary since October 1994. He obtained the authorization cards from the ATM technicians in the Union's organizing drive among those employees and attended the negotiating sessions commencing on February 9 that will be discussed below. He testified that prior to the May 23 picketing at the facility, he averaged 80 hours of work per week, including weekend work, but that after that day, he averaged between 40 and 42 hours of work per week. He subsequently testified that about 2 or 3 weeks later he worked between 45 to 60 hours a week. When he first noticed the reduction in hours, he complained to Urso, who told him that one of the problems was that Mariani had Army reserve duty one weekend each month and "he couldn't work around my schedule." Mariani told him that he had that obligation since he began working for Respondent and it did not seem to be a problem before. Urso told him that if he had a problem he should speak to Riley, but Riley told him that he had no authority over scheduling as Urso was in charge of that. Riley testified that Urso did the scheduling, but he never told Mariani that he could not override Urso; in fact he could do so if he wished to.

Riley testified that, to his knowledge, Mariani's working hours were never reduced and he continued to work, basically, the same hours after May 23 that he had previously worked. He testified further that in addition to his Army Reserves, Mariani asked for, and was granted, other time off. In September, Mariani asked for a week's vacation to visit his family and Riley granted this request and gave him 40 hours of vacation pay, even though he was not obligated to do so. In about October, Mariani requested, and was granted, a week off for personal leave. The weekly hours worked by Mariani in 1995 are as follows:

| | |
|---|---|
| January 7 | 77 |
| January 14 | 77 |
| January 21 | 54 |
| January 28 | 52 |
| February 11 | 43 |
| February 25 | 90 |
| March 4 | 92 |
| March 11 | 76 |
| March 18 | 64 |
| March 25 | 56 |
| April 1 | 54 |
| April 8 | 69 |
| April 15 | 69 |
| April 22 | 52 |
| April 29 | 41 |
| May 6 | 84 |
| May 13 | 73 |
| May 20 | 46 |
| May 27 | 41 |
| June 3 | 60 |
| June 10 | 41 |
| June 17 | 54 |
| June 24 | 82 |
| July 1 | 75 |
| July 8 | 66 |
| July 15 | 42 |
| July 22 | 57 |
| July 29 | 44 |
| August 5 | 0 |
| August 12 | 0 |
| August 19 | 57 |
| August 26 | 62 |
| September 2 | 64 |
| September 9 | 61 |
| February 18 | 67 |
| September 16 | 48 |
| September 23 | 59 |
| September 30 | 40 |
| | (Vac.) |
| October 7 | 31 |
| October 14 | 0 |
| October 21 | 49 |
| October 28 | 53 |
| November 4 | 52 |
| November 11 | 63 |
| November 18 | 52 |
| November 25 | 56 |
| December 2 | 74 |

Mariani testified that the principal reason for his shortened hours after the strike was that Respondent changed his route to one with less traveling. The evidence establishes that for the week ending May 27 he lost 10 to 12 hours of work because of the strike that he participated in. He asked for, and received time off in order to be present for the March 8 negotiations and also was given time off on March 18, 19, and 22. He also received time off for reserve duty on April 22 and 23. He next requested, and was granted, time off on June 9 and 10. He did not work the weeks ending August 5 and 12 because he had 2 weeks' reserve duty. For the week ending September 30 he asked for, and was granted, a week off to visit his family and, even though he was not entitled to 40 hours of vacation pay at that time, Riley gave him the vacation pay. In October he asked for personal leave to assist his family, and was granted this time off.

The above chart establishes that Mariani worked an average of 66 hours a week from the week ending January 7

through the week ending May 20. From the week ending June 3 through the week ending December 2 (excluding the week ending June 10, when he was granted 2 days off, the weeks of August 5 and 12, and the weeks of September 30, and October 7 and 14) Mariani averaged 59 hours of work per week. It is alleged that this change was caused by his union activities. There is no question that Respondent had knowledge of Mariani's union activities as he participated in the bargaining with other representatives of the Union. What is missing here is animus. There is no credible evidence of animus toward Mariani or the Union by Respondent. This is similar to the problem encountered by the General Counsel in the prior hearing before Judge Nations, who dismissed three allegations of unlawful discharges due to the lack of animus on the part of Respondent, finding only two isolated violations of Section 8(a)(1) of the Act, one of which was an unspecified threat of reprisal made to Mariani on January 20 for acting as the union representative for an employee who was about to be fired. In fact, in the instant matter, in the midst of the period in which Respondent was allegedly discriminating against Mariani, Riley gave him 40 hours of vacation time that he was not obligated to give him. Although it is true that Mariani's hours dropped by about 10 percent, this may be due to the loss of business that Respondent's armored division suffered as a result of the work stoppage on May 23. Because of the lack of animus here, I recommend that this allegation be dismissed.

It is also alleged that Respondent terminated employee Monczka on about May 25, because of his union activities in violation of Section 8(a)(1) and (3) of the Act. Respondent defends that Monczka was terminated on May 25 because he refused to list each of his prior employers and the dates of employment on his employment application. Monczka began working for Respondent as an armed guard in the armored division in February or March, at which time he was given a five-page application for employment to complete. The first page asked for personal, educational, and security data. The second page requested driver's license data, moving violations, driving experience, and military data. The third page, and the one most relevant to the issues here, requires applicants to list all employment, self-employment, or unemployment over the past 10-year period. The categories requested are employer, address, name and title of supervisor, phone number, your title and description of duties, the period of employment, and starting and ending rate of pay. There is space for six such employers. The fourth and final page require the applicant's signature certifying the nature of the employment with Respondent and authorizing Respondent to conduct a preemployment investigation of the applicant. This final page states as follows:

> Employment at Wells Fargo Armored Service Corporation is a termination at will relationship. You should understand that the nature of Wells Fargo Armored's business requires a rigorous hiring process. You must pass all such qualification standards and tests to be considered for employment. In some cases, it takes longer to get results than Wells Fargo Armored prefers. Wells Fargo Armored may offer employment and hire an individual before all hiring procedures have been completed.
>
> You must be aware and you hereby acknowledge that if you are hired before the results of all hiring procedures are known, and the results of these procedures are not satisfactory to Wells Fargo Armored when they are completed, that the offer of employment is revoked and you will be terminated.

Monczka signed a union authorization card on April 26. He testified that on about that date, while he was at the facility, he told Jim Newman, branch manager and an admitted supervisor of Respondent, that he had signed a union card and asked him if he would be fired for doing so. Newman said: "No, you're not going to be fired. Don't worry about it." Newman testified that he does not recall Monczka ever telling him that he had signed a union card or asking him if he would be fired for doing so. At a union meeting on May 22, Monczka was elected to be a union steward. Newman testified that when he called Monczka on May 24 and told him that it was important that he complete his employment application, as will be discussed more fully below, Monczka told him that he had been elected shop steward for the Union and asked if there would be any ramifications. Newman told him that, as far as he was concerned, it was his decision and it did not matter to him.

Prior to his employment with Respondent, Monczka was employed by other security and armored car firms, both as an armored car driver and messenger and as an ATM technician. He filled out Respondent's employment application on March 2. The only contested issue is page 3, prior employment. He listed four prior employers: "Berkshire," with the address as "Springfield, Mass.," a telephone number, and the period of employment as "95" under the "to mo/yr" with nothing filled in under the "from mo/yr." The next employer listed is "Pinkerton Banking" with an address of "Wallingford, Ct.," no telephone number and no period of employment given. Next is "A & R Security" of "Westfield, MA," with an 800 telephone number, but no period of employment. The final employer listed is "Pinkerton Security," with no location or address and no dates of employment, but there is a telephone number listed. On March 3, Monczka filled out another form for Respondent; under "List Employers During Past 5 Years," he listed A & R Security, Westfield; Pinkerton Security, Westfield; Pinkerton Banking, Wallingford; and Berkshire Armored, Springfield. In the columns "from" and "to," at the top he listed 88 and at the bottom he listed 95, with no specification. He testified that he was not more specific in these applications because he had no accurate recollection of the dates of employment at these employers. In addition, he was confused about the dates because he transferred from one job to another on three occasions. He testified, however, that in about May, he gave Donna Pierce, an office employee at the facility, six of his prior pay stubs; five were from Pinkerton in July, September, and December 1994, and one was from A & R in December 1993.

Monczka testified that on about May 10, Pierce called him and told him that he had to call his prior employers and fill out the dates on his employment application; if he did not do so, he would be terminated. He told her that he would do what he could. He then called A & R and was told that the files had been moved; he called the new location and they could not give him the dates that he was attempting to

get: "I just got the run-around." He then called Pierce and told her the telephone numbers that he had obtained, and she said they would be fine. On about May 11, Monczka told Newman about his conversation with Pierce where she told him that he would be terminated if he failed to provide Respondent with the information. Newman told him: "Don't listen to Donna, you're not going to be fired." On May 16, Newman called him and told him that there was some paperwork at the office that had to be completed; he was not specific about what kind of paperwork it was or who, in the office, he should speak to. On the following day, he went to the office and Eileen handed him his employment application with attached stickers containing telephone numbers; she told him that he had to fill out the dates on the application. He took the application home with him and made some telephone calls, but was not able to obtain any of this information. Lacking accurate information, he did not put any additional information on the employment application.

Monczka was scheduled to work on May 23, but he did not work because he picketed with the Union on that day. On the following day, Newman called him and told him that he had to fill in the employment dates on his employment application immediately; failure to do so would result in termination. He later testified that Newman did not mention the threat of termination in this conversation. Monczka said that he was going to the facility the following day to pick up his check and would bring in the application at the same time. He also told Newman that he had been elected a union steward and Newman said, "That's your decision." He went to the facility on the following day at about 2 p.m. with his father and gave Eileen his employment application just as it was when he had first filled it out in March. She said that he did not fill out the dates and he said that he did everything that he could and she gave the application back to him. She then walked into Riley's office, came out, took the application and brought it into Riley's office followed by Monczka and his father. Monczka's father said: "You shouldn't be doing anything here without a delegate present" and Riley shrugged his shoulders and said, "Well, I don't think that I can do anything with this." Monczka did not say anything, and he and his father left without anything else being said. About an hour later, when he was home, Monczka received a call from Newman, who said that he was sorry, but he had to inform him that he was fired. When he asked why, Newman said that it was because he did not fill out the dates on his application. His termination slip from Respondent stated the reason as: "Failure to comply with company requirements."

Monczka testified that when he filled out the employment application, he read the requirement of listing all employment for the prior 10 years, but a woman who worked in the office at the facility, whose name he does not know, told him that he had to list only employment for the prior 5 years. He did not provide the employment dates for these employers or the telephone number for, at least, one, because he did not have this information and could not recall when he worked for these employers.

Urso testified that, beginning in about early May, he received a number of messages from Rosado to tell Monczka (and other employees as well) that the Borg-Warner people in Georgia, and called EQCC (Employment Quality Control Center) who do the security checks for Respondent, notified the facility that he had to complete his employment application. On two or three occasions in the month of May, he told Monczka that EQCC, Newman, Rosado, and Eileen wanted him to complete his employment application, and if he did not do so, he would be terminated. On May 24, Newman told him to call Monczka and tell him that he had 1 more day to complete his application before he would be terminated. He called Monczka at home that day and told him that Newman said that unless he completed his employment application by filling in the dates of employment at his prior employers, and brought it in the next day, EQCC would terminate him. Monczka told him that he would take care of it and bring it in. Newman, who is no longer employed by Respondent, testified that in about mid-May, Monczka told him that Pierce had said that he could be fired because employment information was missing from his employment application. Newman told him not to worry about it. Sometime shortly thereafter, at Riley's direction, he called Monczka and told him that he had to provide the office with dates of prior employment and supervisors. On May 24 he again called Monczka at Riley's direction and told him that he had to provide the office with the prior employment dates and supervisors, and that if he did not supply this information, EQCC would force them to terminate him. Monczka said that he would provide the information on the following day. Monczka then told him that he had been elected union steward; Newman said that it did not matter to him. Newman called him again on the morning of May 25 to make sure he came in with the information: "I didn't want Lou to get terminated." Monczka said that he would come in with the information later in the day. Newman called him again at about 1 p.m.; he said, "Lou, you've got to get this stuff in here. They're going to terminate you." He said that he was on his way.

Rosado, who is employed by Respondent as a clerk at the facility, testified that one aspect of her job is working with EQCC for newly hired personnel. EQCC verifies the information contained in the employment applications completed by newly hired personnel, checking driving records, prior employment, addresses, and possible criminal records, and give the final approval for hiring. When EQCC asks for additional information for an employee, it is usually through Rosado. Because of the large number of employees that they had recently hired, Rosado did not send Monczka's employment application to EQCC until April 6. On April 7, EQCC wrote: "The following documents are required to be sent to EQCC in order to determine if subject applicant meets the minimum standards for hire. 1. Verification of employment for the following dates: Jan. 1990 to September 1994." After receiving this she spoke to Monczka from one to three times; she told him that EQCC needed more information from him about dates of employment and his supervisors in order to complete their background check, and unless he provided them with this information he could be terminated. Monczka "seemed compliant and said he would get me the information." Between that time and mid-May, on at least one occasion, she told Urso to tell Monczka that it was urgent that he complete the employment applicant as she had told him, because his job was on the line. Monczka never provided her with the information that EQCC was requesting. On May 19 she spoke to Monczka in the office. She gave him a copy of his employment application and told him to complete the

application, particularly the dates of employment that EQCC was requesting, and he said that he would get her the information.

Sometime in April, Rosado received from Borg-Warner, which performs the investigations of the applications for Respondent, employment verifications of Monczka's application. It could not verify anything regarding his employment with Berkshire, concluding: "Need exact name of employer to verify. Checking area code (413) numerous listings beginning with Berkshire." As for Pinkerton, it did verify the dates that he was employed there, his position, and that they would rehire him. For A & R, they verified his position there and that he was employed for approximately 1 year, without dates.

Rosado testified further that on May 25 Monczka came into the office with a man whom he identified as his father, and said that he wanted to speak to Riley. She told Riley that Monczka wanted to speak to him and Monczka and his father went into Riley's office. She did not join them in Riley's office, and the only thing that she heard while Monczka was in Riley's office was Riley telling him that they needed the information, and if he did not give it to them he would be terminated.

Mary Murray, who had been employed by Respondent as a "temp" from February through the middle of June, and then became a full-time employee, testified that she was seated at the computer in Riley's office on May 25 when Monczka and his father came into the office; Monczka had testified that only Riley was there. While working at the computer she heard the person who came into the office, Monczka, say in a loud and angry tone: "I'm not filling this out. You fill this out." At that point she turned around, and Riley said to Monczka, "I can't fill it out. I don't know what months, days and years you worked. You have to fill it out." Monczka again said, "I'm not filling it out," and Riley said, "If you don't fill it out I'm going to have to terminate you." Monczka said, "I'm not going to." The man who came in with Monczka told him: "Don't say anything more, we're going to talk to a lawyer," and they left.

Riley testified that job applicants fill out employment applications where they are required to list all their employment for the prior 10 years. They are usually hired before the Respondent can do a complete investigation of their prior employment. This investigation is performed by Borg-Warner in Georgia. EQCC makes the final decision whether an employee will be hired based partially upon this Borg-Warner investigation. Fairly often, Borg-Warner notifies the facility that the employment applications are incomplete and that they need additional information. Rosado was the person at the facility who dealt with this, and during this period, she told him that she was notified that Monczka (as well as others) had to supply more preemployment information. On about May 24, after Rosado told him that she still had not gotten the information from Monczka, Riley told Newman to tell Monczka that he had to get the information to Rosado, and if he did not do so, he would have to terminate him. On May 25, in the afternoon, Monczka walked into his office with another man whom Riley later was told was his father. Murray was working at a computer in his office at the time. Monczka had his employment application in his hand and threw it on Riley's desk, saying, "I'm not going to fill it out, you fill it out. It's not my job and my problem, you hired me." Riley told him that if he did not fill it out he could not work for Respondent, "that's why it needs to be completed." Monczka repeated, "I'm not going to fill it out, you fill it out" and Riley asked how could he fill it out when he did not know where and when Monczka had been employed. Monczka said: "Well, that's not my problem" and Riley said, "Well, you no longer work for Wells Fargo." The person who came in with Monczka said: "You will hear from our lawyer" and they left. After they left, Riley instructed his secretary to fill out termination papers for Monczka. There is a notice of separation of employment report form signed by Riley stating that Monczka was terminated for insubordination. In addition, the facility was notified by EQCC on May 30, that Monczka had to be terminated immediately for "Failure by branch to send previously requested documents required to have employee meet the minimum standards established by Wells Fargo." Rosado testified that after she told Riley of this May 30 memorandum from EQCC, he told her to notify EQCC that Monczka had already been terminated. Riley testified that any union activity on Monczka's part did not play any part in this decision to fire him. Newman testified that he went to Riley's office after Monczka left on May 25; Riley told him to call Monczka and tell him that he was terminated, and he did so later that afternoon. On the following day he gave Monczka a "pink slip" which states that he was terminated for "Failure to comply with company requirements."

Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of establishing a prima facie showing to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. If the General Counsel satisfies this burden, the burden then shifts to the Respondent to establish that the same action would have taken place even absent the protected conduct. As discussed above in the discussion of the Mariani allegation, there has been no union animus displayed by Respondent. It may have engaged in hard bargaining, as will be discussed below, but in both Judge Nation's case and in the instant case, there has been no evidence of animus, other than the 8(a)(1) violation found above. The sole union activity on the part of Monczka supporting the General Counsel's case is that he signed a union card on April 26 and was elected union steward on about May 22. However, 16 other employees also signed union authorization cards, and, as I credit the testimony of Newman over that of Monczka, there is no evidence that Respondent was aware of, or cared, about his signing the card. There remains the fact that on May 24 Monczka told Newman that he had been elected union steward. Although this might normally be a crucial factor in an 8(a)(3) case, coming 1 day prior to a termination, it has little importance in this case. When Monczka told this to Newman, Newman replied that it did not matter to him, and I believe him and, considering the background here, I believe that it did not matter to Respondent either. In addition, this allegation might reach the level of suspicious if the Respondent's inquiries began after Monczka notified Newman of his union position. However, these regular inquiries of Monczka to complete his employment application began at least a month earlier, prior to any union activity on his part. The puzzling aspect of this allegation is why Monczka refused to comply with Respondent's demands to complete his application. Considering the large amount of

money that these employees handle, it is understandable why Respondent would want detailed information on all his prior employers. I could more easily understand why he could not remember an address or dates of employment for an employer 9 years' earlier, but Monczka commenced working for Respondent in about March, and the best he could provide for periods of prior employment was a single "95." I need not determine why he refused to provide this information. Rather, I find that Respondent has satisfied its burden that he would have been fired even absent his union activities. I therefor recommend that this allegation be dismissed. I shall also overrule the objection based upon Monczka's termination, the only objection pending herein.

### C. *The 8(a)(1) and (5) Allegations*

There are two separate 8(a)(1) and (5) allegations herein: it is first alleged that Respondent assigned armored unit work to its ATM employees, reclassified certain employees in the armored unit, and changed their hourly wage rate from $8.75 to $8, without prior notice to, or bargaining with, the Union. It is also alleged that by letter dated April 21, the Union requested certain information from Respondent and, although this information was relevant to the Union as the bargaining representative of its armored unit employees, Respondent failed and refused to provide the Union with this information. Further, the General Counsel alleges that the extent of the unfair labor practices herein warrant a *Gissel* bargaining order.

The Union was certified as the representative of the armored unit employees on about August 31, 1994. The Union filed a petition to represent the ATM employees on May 25, and a Stipulated Election Agreement was approved on June 7. At the election conducted on July 12, 2 votes were cast for the Union, 13 votes were cast against the Union, and timely objections were filed.

A number of employees testified to situations where Respondent assigned ATM unit employees to perform armored unit work or reclassified certain armored unit employees and unilaterally changed their hourly wage rate from $8.75 to $8. Lopez, who began working for Respondent as an ATM technician in March, testified that in about early June, he was assigned to be the messenger guard on route 3, a commercial stop, which is a term for a route that involved picking up and receiving liability from a business or a bank. During this period he spent about two-thirds of his time acting as a guard on commercial stops and about one-third of his time servicing the ATM machines on the same route. He continued performing this work on that route until October, when he left Respondent's employ. He testified further that in July, he attended a meeting of all armored personnel. At this meeting, Riley said that there would be a "reclassification in the pay structure" and that when armored unit teams went out, the messenger guard would continue to receive $8.75 an hour, but the driver would be paid $8. After this meeting, he usually worked as a messenger guard, but he drove on occasion and continued to be paid $8.75 an hour. Tofil testified that he also performed commercial stops on route 3 in about June and July. Mariani testified that, to his knowledge, Lopez and another ATM technician, Henry Biffle, have performed armored unit work since about January on routes 3 and 6, and Richard Kitson and other ATM employees have done the "Vermont run." In addition, Mariani identified Respondent's work schedule for July 18, which lists ATM employees Lopez, Biffle (who was working with Mariani), and Kitson as messenger guards, and Charles Johnson,[2] Sherwood Trueman, and Roger Lemay as driver guards. He testified that these employees performed both armored unit work and ATM work. In addition, the General Counsel introduced work schedules establishing that some ATM employees performed armored unit work from September through December. Mariani, who has been employed by Respondent since May 1994, testified that the past practice had been that both driver guards and messenger guards were paid $8.75 an hour. After the strike, the most senior of the two decides whether he wants to be the driver or the messenger. If he is the driver he receives $8 an hour; if he is the messenger, he receives $8.75 an hour. As a member of the Union's negotiating committee, he is unaware of any negotiations on this subject. He testified that at a negotiation session in March, he brought up the fact that ATM employees were performing armored unit work and Riley denied that ATM employees were performing armored unit work, but said that the two units were going to be merged, although they never did merge.

Union Lawyer Paul Schacter testified that at the April 18 or 19 negotiating meeting, he told Respondent's representatives that he was told that they were using ATM employees to service the armored routes, and he demanded that the unit be expanded to include ATM employees. Riley said that Respondent's policy was to have umbrella branches and have armored and ATM employees work together, but they would not recognize a merged unit. Schacter also testified that he recollects that the issue of driver guards being paid $8 an hour was brought up by the Union at either the March or April negotiation session, but the Respondent did not offer to negotiate about it. Riley did say that "branches are now going to be umbrellas and we're going to mix together ATM and Armored."

The vehicles operated by the armored unit employees called "Big Red" or "Red," are two person vehicles, while the ATM technicians drive a "white," a single person vehicle. It is undisputed that Respondent maintains a separate payroll and seniority list for the armored unit and for the ATM technicians unit. Riley testified that when he became area manager at the facility, he decided that it was not economical to continue operating a Red and White in the same area daily, when one vehicle could handle both commercial work and ATM work and there was a substantial cost savings in doing this. This practice increased after the 1-day strike which resulted in Respondent losing almost all of its bank customers, resulting in fewer Reds and more of a need to consolidate. However, even after the strike, a large majority of the commercial stops were made by the Reds. The only route that he could recollect that regularly performed both commercial stops and ATM work was Lopez' route and, as far as he knows, no armored employee suffered a reduction in work hours or pay because of this change. However, during cross-examination, he testified that some armored employees were on layoff at the time that he was as-

[2] Respondent's payroll records state that, effective March 1, Johnson transferred from a position as ATM technician to a messenger guard, although he continued to perform ATM, as well as armored work. In about July, he was transferred back to an ATM technician position.

signing ATM employees to armored unit work. He did not bargain with the Union about this subject. Riley testified further that sometime prior to June, he was instructed by superiors that all employees in the armored branch had to be classified as either messenger guards or driver guards, and that half the guards were to be classified in each category. In June, he met with the armored unit employees and told them that half would be classified as messenger guards and the other half as driver guards. He also told them that whoever drove the vehicle would be paid $8 an hour while the messenger guard would be paid $8.75 an hour. However, while he was employed at the facility, until October 31, he never made that change and the driver guards continued to be paid $8.75 an hour.

Negotiations between Respondent and the Union for the armored unit employees took place on February 9 and 10, March 8, April 18 and 19, and July 20. Although there was a substantial amount of testimony regarding the proposals and counterproposals that were made at these meetings, a large majority of this testimony is irrelevant to the proceedings herein as there is no allegation of bad-faith bargaining or any issue of impasse. The sole issue of any relevance relating to these negotiating sessions relates to the allegation that Respondent refused to provide the Union with the information that it requested in its letter dated April 21 and this involves some statements that allegedly were said at the negotiations.

Schacter was the principal union spokesperson at the negotiations. He testified that at the April 19 session, the Respondent proposed that there would be no wage increase in 1995, and that any increases in the following 2 years would be dependent upon the facility exceeding a certain level of profit. In addition, under the proposal, only a certain percentage of the full-time employees would receive health, welfare, vacation, and fringe benefits. David Vaughan, counsel for Respondent, then distributed a paper showing the losses allegedly suffered by the facility and said that "the Company had lost a lot of money." He reminded us that in a previous session Art Erb [the predecessor of Barry Flink, Respondent's vice president of human resources] said that "each branch would have to rise and fall on its own. And that the Hartford branch had an inability to pay, because it had lost a lot of money." Then Area Manager Douglas Jack said that the branch had been losing money in past years, but that 1994 was particularly bad. The branch profit-and-loss statement concluded that the branch lost $326,000 for the year 1994. Schacter told Vaughan that the branch was part of the overall organization, and he did not see why there could be no increase simply because the branch was not profitable. Vaughan repeated that each of Respondent's branches was expected to stand on its own individual performance and that Respondent had negotiated wage increases at some facilities that were profitable. Schacter said that the Union needed more specificity than was provided by the statement; for example he wanted to know how much of the expenses at the facility were charged to the armored unit as compared to the ATM unit or the vault operation. Vaughan told him: "All you need to know is that we're losing money. And if we're losing money, we certainly can't make any type of an economic offer that we would if we were making money." Before the meeting concluded, Schacter said that the Union could not respond to the Respondent's proposal until they saw some underlying data to support the Respondent's claimed "inability to pay." Respondent never claimed that it had an inability to make a wage increase at the facility based upon losses suffered by the Respondent nationwide. Schacter was asked whether Respondent's representatives expressed an unwillingness or an inability to pay an increase. He testified: "You said we can't make it because we've lost a lot of money." Mariani testified that at this meeting, Flink said that he "can't" give a wage increase because of the losses: he did not say that he was "unwilling" to grant an increase.

Jack, who had been Respondent's area manager at the facility from about April 1994 to February, when Riley assumed that position, and is presently Respondent's area manager at its Lyndhurst, New Jersey facility, was present at the April 18 and 19 sessions along with Vaughan and Flink, who had just replaced Erb. At the April 19 session, the Respondent proposed wage increases for 1996 and 1997 that were dependent upon certain percentages of profit in those years. The Respondent distributed a statement that showed that Respondent had lost $326,000 at the facility in 1994, but there was no discussion about profits or losses in prior years. At no time during the negotiating sessions did Respondent's representatives claim an inability to grant wage increases at the facility based upon corporatewide profits or losses. Riley testified that after they distributed the statement to the Union, they told the union representatives that "every branch runs on its own. . . . It's not one big unit operating under one umbrella." Flink testified that after giving the branch statement to the Union, they said that they were not offering any wage increase in the first year of the proposed contract. Vaughan said that its actions in negotiations are determined by the performance of the individual branches: "[W]e do not award increases or decreases based on the overall results of our corporation. Each branch stands alone, each branch is in fact a freestanding profit center." Flink told the union representatives that Respondent had granted wage increases at branches that were profitable. Respondent's representatives never expressed an inability to grant a wage increase at the facility: "And specifically I did not say inability to pay, I said unwillingness to pay. I have never said we are unable to pay."

By letter dated April 21, Vaughan wrote to Schacter, inter alia:

> I realize that it is difficult for a union to ever agree to a multi-year contract that doesn't call for a wage increase in the first year, regardless of past economic performances at the facility in question. However, I hope the union committee has come to the realization that Wells Fargo lost a lot of money at the Bloomfield armored branch in 1994, and that any future wage increases have to be tied in to profits made at that facility in 1995 and 1996. As Art Erb, Barry Flink and I have stated several times over the last three months, each Wells Fargo branch has to stand on its own performance and, at the present time, the Bloomfield branch is on very shaky economic grounds.

By letter dated April 21, Schacter wrote to Vaughan:

> At the negotiations sessions on April 18 and 19, 1995, the Company asserted that its position concerning a

> limitation on the number of employees to receive benefits and concerning no offer of wage increases in 1995 and no offer of wage increases in 1996 and 1997, except on the Company's showing of a profit above a certain level, was on the basis of the branch having "lost a lot of money in 1994" and not showing a profit in prior years. It was also stated that to improve efficiency and cut labor costs, ATM employees were being integrated with armored employees. To allow the Union to assess these issues, you are hereby requested to provide the following information within 10 days from the date herein[.]

The letter then listed 24 items desired by the Union. Rather than listing these items verbatim, it suffices to state that a large majority request financial information for Respondent as a whole and for the Bloomfield office, and for more specifics on the items listed in the branch profit-and-loss statement given to the Union on April 19. The final two requested items concern the assignment of ATM employees in the armored branch. There then followed a series of letters between Schacter and Vaughan where the issue of the requested documents was discussed and argued. Vaughan wrote to Schacter on April 24, inter alia, that he was studying the request under the *Truitt* doctrine and subsequent case law to determine what documentation, if any, the Union is entitled to. He also states:

> For example, I fail to see that "certified financial statements" for Wells Fargo "company-wide" for 1994 would be relevant to our negotiations for the Bloomfield armored branch since the company is not claiming any inability to make a 1995 pay increase at Bloomfield based on its corporate-wide 1994 revenues.

Schacter responded by letter on the following day alleging that all of the requested information was relevant. By letter dated May 3, Vaughan notified Schacter that:

> With a few exceptions that are noted below, these financial records and other information (where they exist) will be made available for inspection by you or your designated representative on or after Monday, May 8, at your hotel or other location in North Atlanta.
>
> As mentioned by me and Vice President Barry Flink at out April 19 bargaining session, as well as in my April 21 and 24 letters, the company's wage proposal is based solely on the fact that the Bloomfield armored branch *lost* over $326 thousand dollars during the calendar year 1994 (as documented in the branch profit and loss statement given to you on the 19th); and is, in no way, based on Wells Fargo's corporate-wide revenues for that year. Therefore, your requests for certified or uncertified financial statements for Wells Fargo "company-wide" in Items #1 and #2 have no relevance to the 1994 profitability of the Bloomfield armored branch and the company is not legally obligated to provide such information to the union.

The letter went on to say that Respondent could not provide the Union with requested item number 3, audited financial reports, for the branch because they do not exist. However, they would supply items 4 through 24, except for item 5 and those portions of items 17 through 21 that relate to the 1993 revenues at the branch, because the Respondent's representatives never alleged during bargaining that its wage proposal related to losses that may have occurred at the branch prior to 1994. Finally, as to item 15 ("Set forth the personnel requirements (number of guards/guns) for each armored account at the Branch in 1995 where the contract specifies a particular requirement"), the letter states that this information will be available to the Union at the facility on or after May 8.

By letter dated May 11, Schacter wrote Vaughan stating that he believes that companywide information, and information for 1993 was appropriate. He also wrote:

> The location which you specified for production of certain material is not appropriate. I am willing to do the entire inspection in the Hartford area, or in the Lyndhurst area. However, requiring a labor organization to travel to your headquarters is not reasonable compliance with the obligations of the NLRA.

Vaughan wrote to Schacter on May 17, again, stating that the Respondent's April 19 wage proposal was based solely upon the loss of $326,000 by the branch in 1994 and was not based upon any losses prior to that time. "Therefore, any financial information concerning branch revenues, expenses or other overhead costs for the year 1993 would be completely irrelevant to our negotiations." Vaughan further stated that he felt that it was not inappropriate to require the union representatives to come to Respondent's headquarters, Atlanta, to inspect the requested information. Schacter testified as to his objection to traveling to Atlanta to inspect the documents:

> And a duty to bargain is at reasonable times and reasonable places. In order for me to be able to fully understand the information that was in the economic data, I needed three or four different people from the branch. . . . And it would be economically very difficult for me to make arrangements to bring that many people to Atlanta to review the records and to house them, to put them up. And that was my basic objection, that that was not reasonable for us to spend that much time and effort.

Flink testified that he and Vaughan met on May 2 and decided to make the acceptable documents available to the Union at Atlanta, with the exception of item 15, as stated in Vaughan's letter dated May 3. As to why they chose Atlanta, he testified that corporate headquarters are in Atlanta and the volume of these documents, which would measure about 5 by 3 feet by 3–1/2 feet would make it expensive and burdensome to copy and ship to Schacter. Like Vaughan's May 3 letter, Flink testified that he did not supply item 3 because it did not exist, and items 1 and 2 because it called for companywide financial statements, and that had no relevance to their negotiations, because they had spoken only of branchwide losses. He also refused to supply the Union with the requested financial information for 1993 because it had no relevance as this data had not been referred to in the bargaining. Respondent was willing to have the union representatives review the information at its corporate offices in Atlanta or they would truck it to a nearby location, but they were not willing to ship it to Hartford or to Schacter's office

in New Jersey. Apparently, the Union chose not to accept Respondent's offer to go to Atlanta to examine the documents offered, and the Respondent never relented and agreed to give these documents to the Union in either Hartford or New Jersey. It is not clear whether the Respondent's offer to turn over item 15 in Hartford was accepted by the Union.

It is initially alleged that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally assigning armored unit work to its ATM employees. Admittedly, since about February, Respondent has been using ATM employees to perform some commercial stops, which is armored unit work. Although this may have been done for the sole purpose of making the operation more efficient (saving the expense of an additional truck) and had no antiunion motive, that does not alter the fact that it was a mandatory subject of bargaining that must first have been discussed with the Union prior to implementation. *Holmes & Narver*, 309 NLRB 146 (1992); and *Westinghouse Electric Corp.*, 313 NLRB 452 (1994). As the Board stated in *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994): "[The] Board has found that an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative." As Respondent never offered to bargaining about the assignment of ATM employees to perform armored unit work, it violated Section 8(a)(1)(5) of the Act.

It is next alleged that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reclassifying certain of its armored unit employees and changing their hourly wage rate from $8.50 to $8. The uncontradicted testimony establishes that the past practice has been that driver guards and messenger guards were each paid $8.75 an hour, regardless of who drove and who worked in the back of the truck. Admittedly, in about June or July, Riley notified the armored unit employees that, henceforth, whoever drove would be paid $8 an hour, while the messenger guard would continue to be paid $8.75 an hour. The only uncertain issue is whether this change was implemented. Lopez testified that on the occasions that he drove after Riley's announcement he continued to be paid $8.75 an hour, and Riley testified that, although he was directed to make this change, and he notified the armored unit employees that he was doing so, he never implemented it, and the driver guards continued to be paid $8.75 an hour. Mariani testified that the past practice of paying both messenger guard and driver guards $8.75 an hour changed in that after about June, after which the driver guards were paid $8 an hour. Although he never testified that he was paid $8 an hour as a driver guard, I credit his testimony and find that Respondent did institute these changes, and did so unilaterally, thereby violating Section 8(a)(1) and (5) of the Act.

The final allegation is that Respondent violated Section 8(a)(1) and (5) of the Act by not providing the Union with the information that it requested in Schacter's April 21 letter. The initial question is whether the information requested was relevant to the Union as the representative of Respondent's armored unit employees. More specifically, was it relevant to the Union in determining the accuracy and honesty of the branch profit-and-loss statement that Respondent gave it on April 19. I find that most of the information requested by the Union in Schacter's letter of April 21 was relevant. In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), the Court stated:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.

I find that Respondent's position during negotiations was that it would not agree to a wage increase for the armored unit employees because of the losses suffered by the facility in 1994. The credible evidence establishes that at the bargaining sessions, the Respondent's representatives repeated that no increase was being offered because of the losses that the branch suffered in 1994. The only witness to testify differently, Flink, testified that Respondent never claimed an *inability* to pay, rather they professed an unwillingness to pay. I found Flink to be less than a credible witness; he appeared to only answer questions that pleased him and was vague or nonresponsive when he did not "approve" of the question. For that reason, as well as the fact that his testimony is unsupported by any credible testimony, and that none of Vaughan's letters to Schacter refer to an unwillingness to pay the increase, I find that Respondent's position was that it would not grant the armored unit employees a wage increase because of the losses suffered by the branch in 1994. Although the branch profit and loss statement distributed on April 19, has a column for "prior year," I believe that was simply for comparison sake to establish the extent of the 1994 losses. I also find that there was little or no discussions of the 1993 loss. Additionally, Schacter's April 21 letter only refers to the branch loss in 1994. Therefor, only the financial data supporting the 1994 loss is relevant.

Respondent (by Vaughan's letter dated May 3 to Schacter) refused to provide the information requested in items 1 and 2 because they request "company-wide" financial information, item 3 because it does not exist, and item 5 and portions of items 17 through 21 because they relate to 1993 revenues. As I have found that Respondent's economic pleas during negotiations did not encompass the branches' profitability in 1993, I agree with Respondent that it was not obligated to provide the Union with the information requested in item 5 and those portions of items 17 through 21 that refer to 1993. However, I disagree with Respondent's position regarding items 1 and 2. Although it is true that on numerous occasions during the negotiations the Respondent's representatives stated that each branch stands or fall on its own, and that Respondent was relying on the branches' performance in 1994 for refusing to grant an increase to the armored unit employees, I agree with the Union's position that it could not intelligently evaluate the sought after information unless it included the requested companywide information. For example, assuming that Respondent services some national accounts at the branch, it would assist the Union to know how Respondent apportions the income received from these ac-

counts among the servicing branches. I therefor find that Respondent must provide the Union with all the information requested in Schacter's letter dated April 21, except for item 5, items 17 through 21 as they relate to the year 1993, and, of course, item 3 if it does not exist.

The final issue on this subject is the location where this information is to be turned over to the Union. Vaughan's May 3 letter to Schacter states that the information would be made available to the Union in North Atlanta, Georgia, near Respondent's headquarters; the Union objects that this in inconvenient and costly for it, and asks that the information be supplied either in Bloomfield or in Lyndhurst, New Jersey.

In *Tower Books*, 273 NLRB 671 (1985), the Board stated that in refusal to furnish information cases, "The cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data." (Citation omitted.) The Board also stated that Respondent has the burden of establishing that the production of the requested information would be unduly burdensome, and if it satisfies this burden, it must offer to bargain about sharing these costs. I find that Respondent has failed to satisfy this burden and therefor must offer to bargain about sharing these costs. I find that Respondent has failed to satisfy this burden and therefor must turn over this information, either at the facility, or in Lyndhurst, New Jersey. Flink described the bulk of the requested information as 5 by 3 feet by 3-1/2 feet; even if that were true, that is not unduly burdensome for a company the size of Respondent. In addition, prior to the hearing here, Respondent never complained about the burden of producing this information, nor did it ever offer to share these costs with the Union. I therefor find that by offering to provide the Union with some of the requested information in North Atlanta, Georgia, Respondent violated Section 8(a)(1) and (5) of the Act.

### D. *The Gissel Bargaining Order*

The complaint alleges that the violations contained therein are so serious that a bargaining order is warranted in the ATM unit pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). I should initially note that I have recommended the dismissal of the allegation that Monczka's discharge violated Section 8(a)(1) and (3) of the Act and, correspondingly, overruled the objection based on this termination, the only objection to the election conducted on July 12. Should the Board sustain these findings, it would certify the results of the election precluding a *Gissel* bargaining order. Should the Board disagree with this finding and create the possibility of the issuance of a *Gissel* bargaining order the Union's majority status is discussed below.

The Union obtained signed authorization cards from 17 employees dated from November 28, 1994, through May 10. Peterson testified that the following card signers were employed in the ATM unit for the week ending May 27: Shawn Lopez (card signed April 24); Daniel Distacio (May 1); Fred Wallace (May 5); William Carrier (April 25); Al Daniel (April 28); James Veilette (May 10); Jusin Lamontagne (April 25); Warren Miltimore (April 30); Todd Tofil (April 24); Julio Rivera (May 2); Jason Goke (May 1); and Ronald Bajek (April 24), 12 in number. Peterson testified further that for the week ending May 27 there were 25 employees in the unit, the above mentioned 12 card signers, plus the following: Henry Biffle, Salvador Escobales, Thomas Halsey, Frank Hart Jr., Richard Kitson, John Lebel, Roger LeMay, David Lyman, Richard O'Donnell, Erik Soderholm, Stewart Street, Norman Wilcox, and Frank Young. Counsel for the General Counsel can therefor establish that the Union had a majority in the unit on that date by either eliminating two of the specified noncard signers, or by establishing that, at least, one of the other five card signers was employed in the unit at that time. The five remaining card signers are Louis Monczka, whose card will not be counted because he was fired prior to the eligibility date and I dismissed the allegation that his dismissal violated the Act, Scott Schmid, Paul Ferragne, Harold McAtee, and Charles Johnson. Counsel for the General Counsel, in his brief, admits that Schmid and Ferragne were terminated by Respondent in March and that these terminations were not the subject of unfair labor practice charges; therefor their cards cannot be counted, leaving McAtee and Johnson, who were not listed on the *Excelsior* list and whose ballots were challenged at the July 12 election.

As stated above, counsel for the General Counsel introduced work schedules for July 18 and September 19 which state that Johnson was employed on those days as a driver guard on the Casino ATM route; he and the messenger guard performed both ATM work and armored unit work on that day. Mariani testified that Johnson transferred between the armored unit and the ATM unit. Peterson testified that when he began his employ at the facility in March, Johnson was an armored unit employee. Respondent's records establish that on March 1, Johnson transferred from his position of ATM technician to a messenger guard. In about mid-July, he transferred back to the ATM unit. Even when he was classified as being in the armored unit, he also performed ATM unit work, principally the Casino ATM route. Newman testified that Johnson "did mixed functions. He would do ATM-type functions one day of the week and the next day of the week he may do armored-type functions." Peterson testified that McAtee was in the armored unit when he began working for Respondent, and he identified a change action form of Respondent which states that McAtee transferred from the armored unit to the ATM unit on July 14. He was uncertain of the amount of ATM work that McAtee performed prior to this transfer.

In *Alpha School Bus Co.*, 287 NLRB 698 (1987), the Board stated that it, in *Berea Publishing Co.*, 140 NLRB 516 (1963), "reestablished the policy for dual-function employees which permits the inclusion of a dual-function employee in a unit if he performs duties similar to those of the unit employees in sufficient degree to demonstrate that he has a substantial interest in the unit employees' wages, hours, and working conditions." In *Continental Cablevision of St. Louis County*, 298 NLRB 973 (1998), the Board stated:

> The test for whether a dual-function employee, i.e., one who performs at least two functions for the same employer, should be included in a unit is whether the employee regularly performs unit work for sufficient periods of time to demonstate that he, along with the full-time employees, has a substantial interest in the unit's wages, hours and conditions of employment. Once an employee is determined regularly to perform a substantial amount of unit work, it is inappropriate to consider other aspects of the dual-function employee's

terms and conditions of employment in a second-tier community-of-interest analysis.

On the basis of these cases, I find that Johnson was a dual-function employee who performed a substantial amount of ATM work, on a regular basis during the period in question, and I would therefor count his authorization card, which gives the Union 13 cards out of a unit of 25, a majority. There is insufficient evidence to establish that McAtee's work satisfied the above-stated requirements.

The final issue, then, is whether a bargaining order would be warranted under *Gissel* should the Board disagree with my finding above, and sustain the objection based on Monczka's termination and overturn the election. I find that a bargaining order would not be warranted. The unfair labor practices found here are neither "outrageous" and "pervasive," nor do they qualify under the next category of "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Rather, the violations found above are isolated and would have minimal, if any, effect on any future election in the ATM unit. I would therefor deny the bargaining order request even had I sustained the objection.

## CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Since about August 31, 1994, the Union has been the exclusive collective-bargaining representative of Respondent's armored unit, more particularly:

> All full-time and regular part-time messenger guards, driver guards, guards and vault custodians who perform guard duties as defined by Section 9(b)(3) of the National Labor Relations Act, employed by the Employer at its Bloomfield, Connecticut facility, but excluding all other employees, all office clerical employees, sales personnel, mechanics and all professional employees and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by threatening its ATM employees with discharge if they continued to honor the Union's picket line at its facility.

5. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally assigning armored unit work to its ATM employees and by unilaterally changing the job classifications and the hourly wage rates of certain employees in the armored unit from $8.75 to $8.

6. Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with information that it requested on April 21, which was relevant to the Union as the representative of Respondent's armored unit employees.

7. Respondent did not violate the Act as further alleged in the consolidated complaint.

8. Having found that the remaining objection has no merit, it is recommended that it be overruled and that the Board issue a certification of results of election certifying that the Union failed to receive a majority of the valid votes counted in the ATM unit election conducted on July 12, 1995.

## THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmitive action designed to effectuate the policies of the Act. In that regard, I shall recommend that Respondent be ordered, on demand, to bargain with the Union about the assignment of ATM employees to armored unit work, and to bargain about the pay of driver guards. I shall also recommend that Respondent be ordered to reimburse any driver guard whose hourly pay was reduced from $8.75 to $8, without prior negotiations with the Union. Further, I shall recommend that Respondent be ordered to furnish the Union with the information requested by Attorney Schacter in his letter to Attorney Vaughan dated April 21, 1995, with the exception of item 5, items 17 through 21 as they relate to the year 1993, and item 3, if it does not exist, and to do so either at the Bloomfield facility or in Lyndhurst, New Jersey. I shall also recommend that the Board certify the results of the election conducted on July 12, 1995.

[Recommended Order omitted from publication.]